***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-1157

*To be argued by*
AUDREY STRAUSS

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1157**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

RAVELLE ROGERS,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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JOHN D. GORDAN, III,
*Assistant United States Attorneys, Of Counsel.*

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UNITED STATES OF AMERICA,

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—v.—

RAVELLE ROGERS,

*Defendant-Appellant.*

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Ravelle Rogers appeals from an order and judgment revoking his probation filed on March 28, 1975 in the United States District Court for the Southern District of New York by the Honorable Constance Baker Motley, United States District Judge.

On March 3, 1975, John T. Connolly, Chief Probation Officer of the United States District Court for the Southern District of New York, filed a petition to revoke Rogers' probation * for violation of the terms and conditions of

* Indictment 74 Cr. 27, filed January 11, 1974, charged that on June 1, 1973 Rogers uttered a forged United States Treasury check in the amount of $261.70. 18 U.S.C. § 495. He was convicted of that offense at a bench trial before Judge Motley in April, 1974. On June 28, 1974, Roger was sentenced to five years

[Footnote continued on following page]

probation. The petition contained three specifications: (1) that Rogers was arrested on January 10, 1975 for attempted burglary and harassment;* (2) that Rogers had failed to work or to seek employment;** (3) and that Rogers had failed to follow his probation officer's instructions and advice that he seek employment.***

A hearing commenced on March 20, 1975 and concluded on March 28, 1975.**** The Court found that Rogers had

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imprisonment, execution of sentence was suspended, and Rogers was placed on probation for a period of five years, subject to the standing probation order of the Court. When Judge Motley suspended execution of sentence and placed Rogers on probation she stated: "That means, Mr. Rogers, that if you go out of here and get involved in any other criminal activity, including drunken driving and fighting with your wife or fighting with anyone else, you are going to jail for five years." (Tr. June 28, 1974, at 16). No appeal was taken.

* Violations of state law are prohibited by section (1) of the Conditions of Probation of the United States District Court for the Southern District of New York (hereinafter "Conditions of Probation") executed by probationers at the beginning of their term of probation and by section (1) of the Standing Probation Order of the United States District Court for the Southern District of New York (hereinafter "Standing Probation Order"). (GX 1A, 1B). The state law alleged to have been violated in this case was the New York Penal Law §§ 240.20, 140.20 (McKinney 1967).

** Section (3) of the Conditions of Probation requires a probationer to "work regularly at a lawful occupation . . ." and section (4) of the Standing Probation Order states that a probationer "shall seek and continue in steady employment . . ." (GX 1A, 1B).

*** Section (6) of the Conditions of Probation provides that a probationer must "follow the probation officer's instruction and advice." Section (10) of the Standing Probation Order provides that the probationer "shall obey such other conditions as may be imposed by the Probation Officer to insure compliance with the foregoing provisions in paragraphs 1 to 9 inclusive." (GX 1A, 1B).

**** The hearing was conducted pursuant to the requirements of Rule 32(f), Fed. R. Crim. P., which provides, in pertinent part, as follows: "The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed . . . ."

violated his probation as charged in each of the three specifications. Judge Motley revoked Rogers' probation and imposed a term of imprisonment of five years.

Rogers is presently serving his sentence.

## Statement of Facts

### The Government's Case

At the hearing before Judge Motley the Government presented evidence with respect to each of the three specifications of violation of probation.

### A. Probationer's arrest on January 10, 1975 for attempted burglary and harassment.

New York City Police Officer William J. Brown testified that at 2:25 a.m. on January 10, 1975 he received a radio call that a female screamed for help at 107 West 82 Street, first floor, rear apartment (Tr. 9). Upon arrival at the address he saw the defendant, Ravelle Rogers, descending the staircase (Tr. 9, 10). Brown detained Rogers and proceeded to apartment 2D, where he saw scuff marks on the door (Tr. 11). He knocked, Mrs. Rogers answered and stated that Rogers had threatened to beat her up and had tried to break into her apartment (Tr. 11). She identified Rogers, who was then placed under arrest (Tr. 11).

Mrs. Vivien Rogers, the defendant's wife, testified that she and the defendant had been living apart for one year and four months (Tr. 31). On January 10, 1975 she arrived home at midnight and found Rogers on the porch of her apartment building (Tr. 32). He asked her for certain photographs, which she agreed to give him on condition that he be accompanied to her apartment by a police officer, as required by a court order prohibiting him from entering her apartment without a police officer (Tr. 32-33).

He returned with a police officer and she gave him the photographs (Tr. 33). About two hours later, Rogers returned to her apartment "banging on my door cursing and carrying on threatening me." Mrs. Rogers went on to testify that the defendant "was cursing, calling me bitch, that he was going to kill me" (Tr. 34). "He told me not to go to work, that he was going to kill me" (Tr. 35). Mrs. Rogers called the police, who arrested Rogers (Tr. 36). The following day Mrs. Rogers appeared at 100 Centre Street and the matter was thereafter referred to the Family Court (Tr. 36-7).*

## B. Probationer's failure to work or to seek employment.

With respect to the second specification—Rogers' failure to work or to seek employment—the Court heard the testimony of James Wilson, Rogers' probation officer. Wilson testified that at the outset of his term of probation, in July 1974, Rogers had been employed as a credit manager at a firm by the name of Arrow Graphics (Tr. 51). Six weeks after his term of probation commenced, Rogers reported to Wilson that he quit that job after an altercation with his boss (Tr. 51-2). Wilson advised Rogers to begin looking for a new job immediately.

Thereafter, Wilson consistently directed Rogers to seek employment and to provide verification of his efforts to find a job, such as stamped cards from the New York State employment service confirming his attempts to secure employment and letters from employers to whom he applied.

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* By order dated February 7, 1975, the Family Court amended a prior order of protection, dated November 1, 1973, to prohibit the defendant from assaulting, menacing, harassing, or threatening Mrs. Rogers and from going to her home or place of employment for any reason whatsoever, and to require that he contact her only in writing or through the Probation Department of the Family Court. (GX 2; Tr. 48).

No cards from the State employment service was ever provided to the probation officer; the only letter Rogers produced was one from a record company stating that he had been interviewed for a job there (Tr. 52-57).

Wilson referred Rogers to an employment counselor, Brenda Hudson, who had previously been successful in placing probationers in jobs (Tr. 53-54). Hudson reported to Wilson that after missing one appointment Rogers had arrived for his interview but it resulted in no referrals for employment (Tr. 54, 55). Wilson then arranged an interview for Rogers with Fred Matthews, a community program officer (Tr. 56). Matthews testified that Rogers told him that he was looking for a job paying $200 a week, whereupon Matthews informed Rogers that jobs in that salary range required a four-year college degree, which Rogers did not have (Tr. 72). Matthews told Rogers that jobs in his line of work—bookkeeping and accounting—were available at approximately $150 per week, but Rogers declined referrals to any job in that salary range (Tr. 75).

## C. Probationer's failure to follow probation officer's instructions and advice that he seek employment.

Rogers' probation officer, James Wilson, testified with respect to the third specification that he repeatedly instructed and advised Rogers to seek employment (Tr. 52-56). It was undisputed that Rogers did not obtain employment following his departure from Arrow Graphics. With regard to Rogers' efforts to get a job, the probation officer's requests for verification were not satisfied, Rogers producing only the letter from the record company (Tr. 57). Referrals to employment counselors brought negative results because of Rogers' unwillingness to take jobs that were available (Tr. 75).

## The Defendant's Case

Ravelle Rogers testified with respect to the first specification that on the night of January 10, 1975 he had gone to his wife's apartment, accompanied by a police officer, to obtain certain photographs in her possession (Tr. 85). Approximately half an hour later Mrs. Rogers called him at home and stated that he had forgotten to pick up their marriage license. He said he would come over to get it and he then went to her apartment (Tr. 86). After he had rung the bell, a man came to the front door and told him to wait a minute (Tr. 86-87). Five or ten minutes later, while he was waiting on the stoop outside the building, the police arrested him (Tr. 87).

With respect to the second and third specifications, Rogers testified that Wilson had directed him to seek employment and that he had done so (Tr. 94, 96). He said that he had looked for work three or four times a week during the latter part of 1974; that he had gone to the Lawrence Agency, Mahoney Agency, Dennison Agency, Graham White Associates Agency and Bookkeeping Unlimited Agency; that he had obtained a letter of his efforts to seek employment from Delight Records; that he had been to Seiko Watches, Jefferson Metals, a funeral parlor in the Bronx and a laundry service in the Bronx; and that he went to a chapter of the NAACP on 96th Street (Tr. 95, 96, 98, 103). In contradiction to Wilson's testimony, Rogers stated that he had informed Wilson orally of these various employers to whom he had applied (Tr. 96, 97). Rogers further denied Matthews' statement that he had been offered job referrals which he turned down because the salary was insufficient (Tr. 105-7).

On cross-examination and questioning by the Court with respect to his efforts to seek employment, Rogers was unable to name anyone to whom he spoke at the various personnel agencies he named on direct examination; as to each agency he said he did not fill out an application because

the agency had his application on file from his visit there during the prior year; nor could he recall the exact location of Jefferson Metals to which he alternately testified that he had applied in February, 1975 (Tr. 144, 145, 155) and in December, 1974 (Tr. 154).

The Court further questioned Rogers with respect to the loss of his job at Arrow Graphics at the beginning of his term of probation. Rogers testified he was fired because of a disagreement with his boss over a "personal matter" (Tr. 128, 163). When asked about absence from work, he testified he was absent for a "maximum" of two or three days (Tr. 128, 164). He further testified that he was late for work about 20 or 25 times (Tr. 164).

After questioning Rogers on this subject, the Court ordered the appearance of Rogers' former employer, Alfred Cavalier, as well as Brenda Hudson, an employment counselor, on the following day at 2:00 P.M. (Tr. 167). The Court further ordered the probation officer to check with certain of the employment agencies and employers named by Rogers to determine if he had made job applications as he claimed (Tr. 167).

## Court's witnesses and conclusion of the hearing

Rogers failed to appear the following day. The Court revoked Rogers' probation based on Rogers' failure to appear (Tr. 169). The probation officer then submitted to the Court a written report of the results of his inquiries at the specific agencies and employers requested by the Court on the prior day (Tr. 170) (Court's Exhibit 3).*

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* Count's Exhibit 3 in its entirety is as follows:

MEMORANDUM

TO: THE HONORABLE CONSTANCE BAKER MOTLEY
U.S. District Court Judge

FROM: JAMES S. WILSON
U.S. Probation Officer

[Footnote continued on following page]

RE: RAVELLE ROGERS
Alleged Probation Violator

On 3/26/75 before Your Honor the defendant testified that in his search for employment he had contacted several companies and agencies. As Your Honor directed we contacted the said concerns for purposes of verification and we report the following:

The Graham White Agency confirms that Rogers resubmitted an application in 2/75. The Mahoney Agency was unable to provide verification. A company spokesman advised that there was no central filing system or directory of applicants. Applicants are referred to individual counselors upon arrival in the office and the counselors attempt to place applicants on a commission basis. Employment counselors for private job agencies are very much like salesmen. Company spokesman are perplexed over how a serious job applicant could make contact with an agency as Rogers alleges, but fail to retain information regarding name of his counselor as this is all important in job placement. As this company employs in excess of 60 counselors, no verification was possible in time allowed. The Lawrence Agency reports the same except they have 80 counselors.

The Seico Watch Company acknowledges that it placed an add in the help wanted section of New York newspapers in 2/75 but received no application from Ravelle Rogers.

There is no Jefferson Metals in Brooklyn. We contacted a Jefferson Tank & Seat Manufacturing Company and were advised that there was no record of Rogers' application.

There is no funeral home in the vicinity of Boston Road and 221st Street in the Bronx. We checked with the Saint Lawrence Funeral Chapel at Boston Road and 212th Street and were advised by Mr. Pucherelli that he has not advertised for help in recent years nor has interviewed Ravelle Rogers. He states his is the only funeral home in the vicinity.

Mrs. Lester Bookeepers Temporary, 1457 Broadway advises us that Ravelle Rogers submitted an application for employment on 5/9/71 but has not applied subsequently.

Bookeepers Unlimited Agency, 505 5th Avenue, Mrs. Eisigson advises that there has been no contacts with Ravelle Rogers in 1974 or 1975.

Respectfully submitted,
JOHN T. CONNOLLY
Chief U.S. Probation Officer
/s/ JAMES S. WILSON
JAMES S. WILSON
U.S. Probation Officer
Ext. 0091

This report was supplemented by an oral report by the Assistant United States Attorney as to her inquiries of the remaining agencies and employers (Tr. 170-173). The Court thereafter reiterated the revocation of probation, basing it, however, on the finding that the first specification had been proven by the testimony of Mrs. Rogers and Officer Brown (Tr. 175). Nevertheless, to complete the record the Court proceeded to hear the testimony of Mr. Cavalier and Miss Hudson.

Mr. Cavalier testified that Rogers had quit his job at Arrow Graphics after he, Cavalier, refused to advance Rogers $50 (Tr. 177). Rogers threatened him "physically and verbally" at that time (Tr. 177). Cavalier further testified that Rogers was on time to work only seven days during the eight months he worked at Arrow Graphics (Tr. 178), and that he was absent from work twelve days during that period (Tr. 178-9).

Miss Hudson testified that she had interviewed Rogers pursuant to a referral by his probation officer, Mr. Wilson. Miss Hudson told Rogers that she could refer him to an industrial job, but he expressed a disinclination to take any job other than office or clerical work (Tr. 182-3).

After hearing these witnesses the Court found the second and third specifications to have been established (Tr. 185-6). The Court specifically stated that it did not "credit the testimony of the defendant . . ." and that he was not a "believable witness" (Tr. 186). A bench warrant was issued for Rogers' arrest.

On the following day, March 28, 1975, Rogers appeared and the bench warrant was vacated. Defense counsel moved for a reopening of the hearing. After initially denying that request, the Court reopened the hearing to allow the defendant to resume the stand (Tr. 192). The defendant declined to put forward any additional evidence (Tr. 192). The Court thereupon again found each of the

three specifications to have been sustained (Tr. 208-9), and sentenced the defendant to five years imprisonment (Tr. 213).*

## ARGUMENT

### Rogers was not denied his Sixth Amendment right to confront and to cross-examine witnesses.

Rogers' sole argument on appeal is that he was denied his Sixth Amendment rights by virtue of the reports to the Court which were made by the probation officer and the Assistant United States Attorney.

After the Government presented its case with respect to each of the three specifications of probation violations,

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* In findings of fact and conclusions of law filed on June 9, 1975, (hereinafter "Opinion"), Judge Motley reiterated her findings in this case. (Appellant's Appendix Item C). As to the first specification, the Court credited the testimony of Officer Brown and Mrs. Rogers, concluding that Rogers had indeed banged on his wife's door in the middle of the night, cursing and threatening to kill her. The Court held this to be a violation of state law. (Opinion at 3).

With respect to the second specification, the Court rejected Rogers' testimony, stating that the testimony of Mr. Cavalier, Miss Hudson and Mr. Matthews was more "convincing." Based on their testimony the Court found "that the defendant failed to behave in a manner consistent with maintaining continued employment and when faced with unemployment failed to take steps by which to secure a new job." (Opinion at 4-5).

With regard to the third specification the Court found that Rogers disobeyed the instructions of his probation officer by failing to provide letters verifying his attempts to find employment. The Court viewed the one such letter which was provided as unauthentic. (Opinion at 6).

Finally, the Court stated that Rogers's absence from the hearing on March 27, 1974 "was wilful and a deliberate failure to follow the court's orders. . . ." "In sum," Judge Motley concluded, "the court is convinced that the probationer has abused the opportunity given him to avoid incarceration." (Opinion at 7).

Rogers testified, contradicting, much of the Government's evidence. The Court then ordered the Government to produce two witnesses to testify as witnesses of the Court. Judge Motley further ordered the probation officer to verify certain details of Rogers' testimony about his attempt to get a job. Rogers' counsel did not object to this procedure. The next day, a written report was submitted to the Court by the probation officer regarding his inquiry pursuant to the Court's direction. There was no objection by defense counsel. This written report was supplemented by an oral report on the same subject by the Assistant United States Attorney, again without objection by defense counsel.* The Court's consideration of the reports is now assigned as error on appeal. The claim is without merit.

Rogers' failure below to claim a denial of the right to confrontation from the Court's consideration of these reports precludes review of the claim on appeal.** *United*

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* Rogers claims in his brief (at 7) that one portion of the oral report was made "[o]ver objection . . . ." However, the record is clear that no objection in any form was made either when the Court ordered the inquiry or on the day the Court heard the written and oral reports (Tr. 170-72). The objection that Rogers relies on (Tr. 205) was voiced the following day, when defense counsel urged the Court to disregard the Government's suggestion that information it had secured from one Emma Rogers at Delight Records that Rogers had been offered a job there, as Rogers had testified the day before, might be suspect because the *presentence report* reflected that Rogers' mother was named Emma Rogers and worked at a record company. This argument, of course, has nothing to do with the claim Rogers now makes.

** Defense counsel raised a confrontation claim below, but specifically on the ground that the right would be violated if evidence were received in the defendant's absence. (Tr. 174). The Court found that absence to be wilful, deliberate, and unexcused, (Tr. 170, 186-7, 190; Opinion at 7), and Rogers has abandoned on appeal any claim of a deprivation of his right to confrontation based on that absence, as he must. *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir. 1972).

*States* v. *Nagelberg*, 413 F.2d 708, 710 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970); *Foy* v. *Bounds*, 481 F.2d 286 (4th Cir. 1973); *Cf. United States* v. *Rivera*, 513 F.2d 519, 526 n. 11 (2d Cir. 1975); *United States* v. *Marquez*, 434 F.2d 236, 239 (2d Cir.), *cert. denied*, 400 U.S. 828 (1970); *United States* v. *Rosenberg*, 195 F.2d 583, 596 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

However, assuming *arguendo* that the point had been preserved, the judgment below should nevertheless be affirmed. First, to properly evaluate the validity of the asserted error on this appeal, the standards applicable to hearings on probation revocations should be considered. To revoke probation the trial judge need only "be satisfied that the probationer has abused the opportunity given him to avoid incarceration" *Roberson* v. *Connecticut*, 501 F.2d 305, 308 (2d Cir. 1974); *United States* v. *Nagelberg*, *supra*, 413 F.2d at 709; *United States* v. *Markovich*, 348 F.2d 238, 241 (2d Cir. 1965).* Furthermore, the District Court is given broad discretion with respect to the revocation of probation. *United States* v. *Carfora*, 489 F.2d 354, 356 (2d Cir. 1973), *cert. denied*, 417 U.S. 909 (1974); *United States* v. *Wilson*, 469 F.2d 368 (2d Cir. 1972). On appeal the standard for review is whether that discretion has been abused. *United States* v. *Garza*, 484 F.2d 88 (5th Cir. 1973); *United States* v. *Weber*, 437 F.2d 1218 (7th Cir.), *cert. denied*, 402 U.S. 1008 (1971); *United States* v. *D'Amato*, 429 F.2d 1284 (3d Cir. 1970); *United States* v. *Nagelberg*, *supra*, 413 F.2d at 710; *United States* v. *Williams*, 378 F.2d 665 (4th Cir. 1967); *Genet* v. *United States*, 375 F.2d 960 (10th Cir. 1967); *United States* v. *Markovich*, *supra*, 348 F.2d at 241; *United States* v. *Taylor*, 321 F.2d 339 (4th Cir. 1963); *Yates* v. *United States*, 308 F.2d 737 (10th Cir. 1962); *Manning* v. *United States*, 161 F.2d 827 (5th Cir.), *cert. denied*, 332 U.S. 792 (1947).

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* This standard was appropriately utilized by Judge Motley in this case. (Opinion at 7).

The abuse of discretion claimed here is the District Court's consideration of hearsay reports which are claimed to have unfairly impeached Rogers' credibility before the Court. However, this claim is made in the face of the well-established principle that strict rules of evidence do not apply to a probation revocation hearing. *Burns* v. *United States*, 287 U.S. 216 (1932); *United States* v. *Mercado*, 469 F.2d 1148, 1152 (2d Cir. 1972); *United States* v. *Weber*, *supra*; *United States* v. *Cates*, 402 F.2d 473 (4th Cir. 1968); *Worcester* v. *Commissioner of Internal Revenue*, 370 F.2d 713, 717 (1st Cir. 1966). The Federal Rules of Evidence explicitly provide that the rules of evidence do not apply to "granting or revoking probation . . ." Rule 1101(d)(3).* The admission of hearsay at probation revocation proceedings has been repeatedly upheld. *United States* v. *Winsett*, Dkt. No. 74-3235, slip op. at 5-6, n. 6, (9th Cir., May 27, 1975); *United States* v. *Miller*, Dkt. No. 74-2959 (9th Cir., April 10, 1975); *United States* v. *Nagelberg*, *supra*, 413 F.2d at 710; *United States* v. *Cates*, *supra*, 402 F.2d at 474; *United States* v. *Ball*, 358 F.2d 367 (4th Cir.), *cert. denied*, 384 U.S. 971 (1966); *United States* v. *Register*, 360 F.2d 689 (4th Cir.), *cert. denied*, 385 U.S. 817 (1966).**

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* In *United States* v. *Matlock*, 415 U.S. 164, 172-177 (1974) the Supreme Court relied in part on Rule 1101 in holding hearsay to be admissible in suppression hearings, a non-jury proceeding like the probation revocation hearing at issue here.

** *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), relied on almost exclusively by Rogers, did not overturn the rule permitting the use of hearsay at probation revocation hearings. While the *Gagnon* decision held that a probationer is entitled to "a conditional right to confront adverse witnesses. . . ." (411 U.S. at 786), the Court specifically stated that a revocation proceeding is not part of a criminal prosecution, that "formal procedures and rules of evidence are not employed" (411 U.S. 789), and that hearsay evidence could be used "where appropriate" (411 U.S. at 782-3 n. 5). Nor is *United States* v. *Mercado*, *supra*, also cited by Rogers (Brief at 13) any support for the inadmissibility of hearsay at probation revocation hearings. In that case the evidence in support of the

[Footnote continued on following page]

Even absent the settled rule permitting hearsay in hearings on probation revocation, Rogers' claim that the admission of hearsay here deprived him of Sixth Amendment rights would be baseless. First, it should be noted that the crucial evidence which directly proved the specifications came from the six witnesses who were produced by the Government and cross-examined by the defense. This is by no means a case where the Government proved the charges against a probationer entirely on the basis of hearsay.

Secondly, the reports of the Probation Officer and the Assistant United States Attorney were of far less significance and impact than Rogers necessarily must claim now to give substance to his contentions on appeal. Rogers' testimony about his efforts to secure employment * was substantially impeached on cross-examination.** Further-

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Government's position on the threshold issue of competency was entirely hearsay, consisting only of a written psychiatrist's report. Furthermore, there was contradictory, live testimony from another psychiatrist who had interviewed the defendant more extensively than the Government's expert. In those circumstances, this Court held that the District Court's finding revoking probation to be against the weight of the evidence.

* Rogers testified that he had approached five employment agencies (Lawrence Agency, Mahoney Agency, Dennison Agency, Graham White Associates and Bookkeeping Unlimited); five employers (Seiko Watches, Jefferson Metals, a funeral parlor, A & P Linen Service and Delight Records); and two employment counselors (at the NAACP and CORE) (Tr. 96, 98, 103).

** With respect to each one of the five employment agencies allegedly contacted, Rogers was unwilling to claim that he filled out an application, stating instead that each agency pulled from the file the application he had filled out when he had applied there the prior year. (Tr. 138, 140, 141, 142, 143). He was unable to state the location of one of the employers allegedly contacted (Jefferson Metals), testifying alternately that he applied there in March, 1975 (Tr. 144, 145, 155) and that he applied in December, 1974 (Tr. 154). When asked to identify persons to whom he spoke in making any of these applications, he could only recall Mr. Valentine at the NAACP (Tr. 155) and a girl in personnel named "Mary" at Delight Records (Tr. 98, 148).

more, while concededly undercutting Rogers' claims concerning his attempts to find employment, the probation officer's written report (Court's Exhibit 3)* and the statement by the Assistant United States Attorney** hardly were conclusive proof that Rogers' testimony was entirely false. Of the twelve agencies, counselors and employers Rogers claimed to have contacted, three confirmed his statements, six denied them, and three were inconclusive.

Further evidence of the small importance that these two reports had in the proceedings below is the fact that defense counsel did not object to their being received, nor

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* That report included a check of four of the five employment agencies and three of the five employers named by Rogers. It stated that the Graham White Agency confirmed that Rogers applied in February, 1975, that the Mahoney and Lawrence agencies were unable to provide verification due to a lack of central records, and that Bookkeepers Temporary and Bookkeepers Unlimited advised that they had not received recent applications from Ravelle Rogers. With respect to the employers, the report stated that Seiko Watch Company had received no application from Rogers: a concern named "Jefferson Metals" could not be located in Brooklyn; and the Saint Lawrence Funeral Chapel, (the only funeral chapel in the vicinity of Boston Road and 221st Street in the Bronx) reported no application from Ravelle Rogers.

** The Assistant United States Attorney's oral supplement to the probation officer's written report concerned the one remaining employment agency, the two remaining employers and one of the job counselors. The Assistant reported that Mr. Valentine, the job counselor at the NAACP, confirmed that Rogers had seen him at his probation officer's request. (Tr. 171). The records of the Dennison Personnel Agency were reported to reflect no contact with Rogers after November 11, 1974, but the agency was unable to check earlier. (Tr. 171). The office of personnel at A.P. Linen Service had no application from Rogers since he quit a job there in October, 1974, although the Assistant stated that "they did concede the possibility [that] he could walk in the door and speak to somebody else and say, "Do you have any jobs?" (Tr. 172-3). Finally, a woman who answered the phone at Delight Records and identified herself as Emma Rogers confirmed that the defendant was promised a job there. (Tr. 171).

did he argue below that any of the information in them was in any way inaccurate—a claim which is also conspicuously absent on appeal.* Furthermore, defense counsel had as ample an opportunity to check and verify the specifics of his client's testimony as did the Government. Had he thought that his testimony would have been corroborated, Rogers could have called representatives of any of the employment agencies and other business as his witnesses or requested the Government to produce any or all of the persons relied upon for the reports to the Court. Rogers chose not to take any of these steps.

Finally, any review of the transcript of the proceedings below and the Court's later written findings establishes that in reaching its determination the Court placed virtually no weight on the reports now challenged as improperly received, even as to those specifications (Two and Three) to which they were relevant. Rather, as reflected even in Rogers' brief (at 9-10), Judge Motley relied on the testimony of the six witnesses called by the Government. Even if this were not the case, the finding sustaining the first specification—Rogers' attempted attack on his wife—had nothing whatsoever to do with his employment history and

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* Rogers argues (Brief at 12) somewhat disingenuously that he was unable to meet the hearsay evidence because he was denied an adjournment for the purpose of having the minutes of the prior day transcribed. That argument is first disposed of by the fact that the basis for the application was to permit Rogers to catch up on what his wilful absence had caused him to miss, which had nothing to do with whether the evidence missed was hearsay (Tr. 189-90). Moreover, the bulk of the information was a written report, fully available to defense counsel from the time of its submission to the Court. The Assistant United States Attorney's oral report consumed a mere two pages of transcript and the specifics, (such as the names of persons called), could easily have been made available to counsel had he chosen to take notes or requested the Assistant to provide him with her notes.

the revocation of probation below is more than adequately supported on that ground alone.*

## CONCLUSION

**The order and judgment of the District Court should be affirmed.**

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

AUDREY STRAUSS,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,*
*Of Counsel.*

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* Rogers seems to contend weakly that since the hearsay reports contradicted his testimony, and since his testimony had to be rejected to sustain the first specification in the revocation petition, the reports infected the findings as to the first specification. The record in no way supports this strained argument.

July 11, 1975 -
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